UNITED INDO-SINGAPURA CORPORATION PTE. LTD. v. FOO SEE JUAN & ANOR.

[O.C.J. (Wee Chong Jin C.J.) September 20, 1984]

[Singapore – Suit No. 2474 of 1982]

Tort – Negligence – Failure to make known contents of letter to clients – Whether solicitors liable – Limitation – Striking out amended writ and statement of claim – Land Acquisition Act (Cap. 272), s.5 – Limitation Act (Cap. 10), s. 29.

Legal Profession – Advocates and Solicitors – Failure to inform clients of contents of letter – Whether negligent in acting for purchasers in purchase of property – Compulsory acquisition – Claim for damages by clients against solicitors.

The defendants are the partners of M/s Foo & Quek, a firm of solicitors. After exercising an option to purchase certain property subject to contract, the plaintiffs instructed the defendants' firm to act for them. The defendants' firm wrote to the Urban Renewal Department of the Housing and Development Board on March 5, 1974 to inquire whether the property was in an area earmarked for Urban Removal. On March 14, 1974 the Department replied stating the property was in an area "under study for comprehensive development". The defendants did not inform the plaintiffs of the contents of this letter of March 14, 1974, nor did they advise the plaintiffs as to the implication of the letter and the likelihood that all or part of the property would be compulsorily acquired in the near future. The defendants did not make known to the plaintiffs a reply dated March 29, 1974 from the Department to their letter but before the reply was received, the defendants had proceeded to arrange for the plaintiffs to exchange contracts with the vendors on or before April 4, 1974 for the purchase of the property, which was subsequently acquired by the Government. The plaintiffs based their course of action on the tort of negligence and claimed damages against the defendants.

The defendants made an application to strike out the amended Statement of Claim endorsed on the writ of June 19, 1982 on the grounds that it disclosed no reasonable cause of action or was frivolous or vexatious or was otherwise an abuse of the process of court. The defendants contended that the claim was statute-barred, the writ having been issued more than 6 years after the cause of action arose. It is common ground that in an action in tort, time will not begin to run until the damage occurs. The question for decision was when the damage occurred.

Held, dismissing the defendants' application: (1) as soon as the section 5 notification was gazetted (November 15, 1975) it was self evident that the plaintiffs had suffered some damage;

(2) if the court was wrong, it had to consider section 29 of the Limitation Act relied on by the plaintiffs. It is arguable that a necessary consequence of the defendants' failure to disclose to the plaintiffs the contents of the reply by the Urban Renewal Department was a concealment from the plaintiffs of the real likelihood that the property would be compulsorily acquired in the near future.

Cases referred to:

(1) *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners (a firm)* [1983] 1 All E.R. 65.

(2) *Re Robinson's; Robinson & Co. Ltd. & Anor. v. Collector of Land Revenue* [1980] 1 M.L.J. 255.

(3) *UBAF Ltd. v. European American Banking Ltd.* (unreported – Decision of English Court of Appeal, December 1983).

(4) *Kitchen v. Royal Air Forces Association* [1958] 2 All E.R. 563.

CIVIL SUIT.

Samuel Julius Sher Q.C. (*Lim Chor Pee* with him) for plaintiffs.

S. Rajendran for defendants/applicants.

Cur. Adv. Vult

Wee Chong Jin C.J.: The defendants are the partners of Messrs. Foo and Quek, a firm of solicitors. The plaintiffs, on March 5, 1974, exercised an option to purchase, subject to contract, premises known as 37, Telok Ayer Street, Singapore ("the property") from City Developments Ltd. ("the Vendors") for whom the defendants were acting.

After the exercise of the option, the plaintiffs instructed the defendants' firm to act for them also in their proposed purchase of the property. As the plaintiffs' solicitors the defendants' firm wrote to the Urban Renewal Department of the Housing and Development Board on March 5, 1974 to inquire whether the property was in an area earmarked for Urban Renewal. On March 14, 1974 that Department replied stating the property was in an area "under study for comprehensive development". The defendants did not inform the plaintiffs of the contents of the Urban Renewal Department's letter of March 14, 1974 nor did they advise the plaintiffs as to the implications of that letter and the likelihood that all or part of the property would be compulsorily acquired in the near future. The plaintiffs allege that in failing to so advise them the defendants were in breach of duty and as a consequence the plaintiffs have suffered damage. The defendants' firm asked for an interpretation of that term and in reply that Department stated: "Based on our Department's policy our reply of March 14, 1974 stands". Although that reply was dated March 29, 1974 it was not received by the defendants' firm until April 3, 1974. That reply was also not made known to the plaintiffs by the defendants.

Before that reply was received the defendants proceeded to arrange for the plaintiffs to exchange contracts with the Vendors on or before April 3, 1974 for the purchase of the property. The terms, (so far as material) of the contract were:-

Clause 2 which so far as material reads:–

"2. The purchase price of $2,700,000.00 shall be paid by the Purchaser to the Vendor in the following manner:–

(a) Immediately on signing of this Agreement a sum of $270,000.00.

(b) On or before June 30, 1974 $270,000.00.

(c) On or before June 30, 1975 $432,000.00.

(d) On or before June 30, 1976 $432,000.00.

(e) On or before June 30, 1977 $432,000.00.

(f) On or before June 30, 1978 $432,000.00.

(g) On or before June 30, 1979 $432,000.00.

PROVIDED the Purchaser may pay any sum in excess of the yearly instalments referred to in (c) to (g) above and any such payments shall be adjusted accordingly from the last instalment.

AND PROVIDED ALSO the payments stipulated above shall not prejudice any rights which the Vendor may have under any subsequent clauses of this Agreement in case of non-payment of any of the instalments aforesaid."

Clause 13 reads:–

"Without limiting or restricting Clause 11 herein it is hereby declared the property is sold subject to any Notices of intended acquisition or acquisition by the Government or other Competent Authority and in the event the Government or other Competent Authority acquiring the property or part thereof after the date of this Agreement but before the actual date of completion the Purchaser shall not be entitled to rescind this Agreement."

Clause 14 reads:–

"Notwithstanding Clause 2 herein should the property be acquired by the Government or other Competent Authority the Purchaser shall forthwith complete the purchase."

The plaintiffs, pursuant to the contract, entered into possession and paid to the Vendors the instalments due and also affected improvements and alterations to the property.

On November 15, 1975 the Government by a *Gazette* Notification gave notice under section 5 of the Land Acquisition Act of the intended compulsory acquisition of the property. Subsequently the Government acquired the property and the Collector made his award on June 18, 1977 of $1,261,000.00. On appeal, the award was increased by $620,610.96.

The facts outlined were pleaded in the amended Statement of Claim endorsed in the Amended Writ of Summons taken out by the plaintiffs against the defendants on June 19, 1982. Their cause of action was in tort – the tort of negligence. The defendants now apply to strike out the amended Statement of Claim on the grounds that it discloses no reasonable cause of action against them, or alternatively, is frivolous or vexatious, or, alternatively is otherwise an abuse of the process of the court. For the purposes of this application the allegations made by the plaintiffs have to be assumed to be correct. The defendants' contend that the claim is statute-barred, the writ having been issued more than six years after the cause of action arose. It is not in dispute that to establish a cause of action the plaintiffs must establish not only a breach of duty, but that that breach of duty occasioned them damage. It is common ground that in an action in tort, time will not begin to run until the damage occurs.

It is also common ground that the critical question I have to decide is, when did the damage occur. The defendants rely on *Pirelli General Cable Works Ltd.* v. *Oscar Faber & Partners (a firm).*[1] In that case the defendants, a firm of consulting engineers in March 1969 advised the plaintiffs in the design and erection of a boiler chimney. They were found negligent in the design of the chimney. It was found that damage in the form of cracks at the top of the chimney could not have occurred later than April 1970. The writ was issued in October 1978. The House of Lords held that the plaintiff's claim was time-barred because the cause of action accrued in April 1970, when damage, in the form of cracks, must have come into existence. Lord Fraser who delivered the leading opinion said at page 72:–

"Counsel for the defendants submitted fault of his clients in advising on the design of the chimney was analogous to that of a solicitor who gives negligent advice on law, which results in the client suffering damage and a right of action accruing when the client acts on the advice (see *Howell* v. *Young* (1826) 5 B & C 259, [1824-34] All E.R. Rep. 377 and *Forster* v. *Outred & Co* [1982] 2 All E.R. 753, [1982] 1 W.L.R. 86). It is not necessary for the present purpose to decide whether that submission is well founded, but as at present advised, I do not think it is. It seems to me that perhaps where the advice of an architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when physical damage occurs to the building."

The defendants also rely on *Re Robinson's; Robinson & Co. Ltd. & Anor.* v. *Collector of Land Revenue*[2], in particular, the following passage

(at page 257) in the opinion of the Privy Council which reads:–

"Once the machinery for acquisition has started to operate, which it has under section 5, then, subject to the power to withdraw, the owner of the land who, it is important to observe, has no right to object to the acquisition, has an interest only in compensation. To accept this earlier stage as that from which acquisition is to start, accords with the policy of section 33, and presents the lesser difficulties in practical operation. Their Lordships are, on this point, in favour of the respondent, being of opinion that the operation of section 5 is the critical date."

They argue that the plaintiffs effectively suffered damage when the section 5 Notification was gazetted in November 1975. They say that from that date the process or machinery of acquisition of the property had started and from that date the plaintiffs could not deal with the property and thereby suffered damage. It was a loss which was a quantifiable loss.

The plaintiffs' answer to that argument is that it was not self-evident that the plaintiffs suffered some damage when the section 5 Notification was gazetted in November 1975. They had not alleged in their pleadings that the market value of the property at the date of the Notification was less than the agreed purchase price. They submit that this must depend on the evidence that will be led at the trial. Their contention is that damage occurred when the Collector of Land Revenue made his award on June 18, 1977 and rely on the unreported case of *UBAF Ltd.* v. *European American Banking Ltd.*,[3] an unreported December 1983 decision of the English Court of Appeal. In that case Ackner L.J. who delivered the judgment of the court said:–

"The plaintiffs are suing in tort – the tort of negligence. To establish a cause of action they must establish not only a breach of duty, but that that the breach of duty occasioned them damage. This is axiomatic. It is possible, although it may be improbable, that, at the date when the plaintiffs advanced their money, the value of the chose in action which they then acquired was, in fact, not less than the sum which the plaintiffs lent, or indeed even exceeded it.

This must depend on the evidence. The mere fact that the innocent but negligent misrepresentations caused the plaintiffs to enter into a contract which they otherwise would not have entered into, does not inevitably mean that they had suffered damage by merely entering into the contract. To take and somewhat modify an example canvassed during the course of argument: A tells B that he wishes to sell his vintage Bentley which he innocently but negligently represents is a blue label long chassis. It is, in fact, a red label short chassis. If A had known, he would not have agreed to buy the Bentley, because he only collects blue label long chassis Bentleys. Assume, however, that the red label short chassis Bentleys were at all material times significantly the more valuable cars so that he was able to resell at a profit. He has then no cause of action."

In my opinion as soon as the section 5 Notification was gazetted it was self-evident that the plaintiffs had suffered some damage. The value of the property to the plaintiffs was at that date reduced because it was property under compulsory acquisition.

If I am wrong, I have to consider another point raised by the plaintiffs in answer to the defendants' plea under the Limitation Act (Cap. 10). The plaintiffs rely on section 29 which so far as material, reads:–

"29. Where in the case of any action for which a period of limitation is prescribed by this Act, either – (b) the right of action is concealed by the fraud of (the defendant); ...

the period of limitation shall not run until the plaintiff has discovered the fraud ... or could by reasonable diligence have discovered it."

The plaintiffs' allegation in paragraph 5 of the Statement of Claim is that the Urban Renewal Department's reply of March 29, 1974 was not disclosed to them by the defendants' firm.

The argument is that this letter should have been passed on to the plaintiffs with the advice that if the plaintiffs proceeded with their proposed purchase of the property there was a substantial risk that the property would be compulsorily acquired. They submit that this non-disclosure is significant enough to enable them to rely on section 29 and is an arguable point for the case to go to trial in an application to strike out the Writ on the ground that the action is statute-barred. They submit that this is non-disclosure which amounts to "fraud" within the meaning of section 29. They rely on a passage in the judgment of Lord Evershed M.R. in *Kitchen* v. *Royal Air Forces Association*[4].

"A necessary consequence of the concealment was, as they must, if they had given any thought to the matter at all, have realized, was a concealment also from the plaintiff of the real effect of their having thrown away – and I use that word deliberately – any case which she might have possessed under the Fatal Accidents Acts in the previous May. Does, however, that concealment amount to fraud? I repeat that there is no finding and no justification for any finding of dishonesty as that word is ordinarily understood. But it is now clear that the word "fraud" in the section which I have read, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman* v. *A.R.T.S. Ltd.* that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter

which Lord Hardwicke did not attempt to define 200 years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."

The defendants submit the non-disclosure relied on by the plaintiffs cannot amount to conduct which is unconscionable.

In my view, it is arguable that a necessary consequence of the defendants' failure to disclose to the plaintiffs the contents of the reply by the Urban Renewal Department, which they received before the plaintiffs had contracted to purchase the property, was, as they must have realised if they had given the matter any thought at all, a concealment from the plaintiffs of the real likelihood that the property would be compulsorily acquired in the near future.

Accordingly, the application is dismissed with costs in any event.

Application dismissed.

Solicitors: *Chor Pee & Co.; Khattar Wong & Partners.*

PAN ASIA SHIPYARD & ENGINEERING CO. PTE. LTD. v. LIM KUY BAK & ANOR.

[O.C.J. (Rajah J.) October 3, 1984]

[Singapore – Motion in Suit No. 5971 of 1984]

Company law – Debenture – Appointment of receiver and manager by debenture holder – Validity – Whether loan immediately payable – Injunction – Companies Act (Cap. 185), ss. 8 & 182.

The main question here was whether the appointment of the 2nd defendant by the 1st defendant on August 28, 1984 as receiver and manager under a debenture dated August 2, 1984 made between the plaintiffs and the 1st defendant (the debenture holder) was a good and valid appointment. Under clause 9 of the debenture, the person to appoint the receiver is "a Director, General Manager, Secretary or Manager for the time being of the Debenture Holder". Under clause 1 of the debenture, the loan was to be repaid by the plaintiffs to the 1st defendant within 9 months of the date of release or the disbursement of the loans, which were made during the 2nd half of August 1984.

Held: (1) the appointment of the receiver was not proper and valid;

(2) the loans had not become immediately payable to the debenture holder as they were only payable within 9 months after the lending of the moneys;

(3) the interim injunction should continue up till the date of trial or further order.

Editorial Note: The defendants appealed against the above judgment in Civil Appeal No. 67 of 1984 which was filed on November 16, 1984.

MOTION IN SUIT.

Mrs. Judith Prakash for plaintiffs/applicants.
Mrs. Anamah Tan (*Ms. Lillian Wong* with her) for defendants/respondents.

Cur. Adv. Vult.

Rajah J.: This was a Motion wherein the Plaintiffs sought the following orders:–

1) That the 2nd Defendant be restrained from acting as Receiver of the Plaintiff Company and from entering the Plaintiff Company's premises from the date hereof until after the trial of this action or until further order.

2) That the costs of this Motion be costs in the cause.

The main question here, as I saw it, was whether the appointment of the 2nd Defendant by the 1st Defendant on August 28, 1984 as Receiver and Manager under a Debenture dated August 12, 1984 made between the Plaintiffs and the 1st Defendant (the Debenture Holder) was a good and valid appointment. The clauses relevant to the appointment of Receiver and Manager are clauses 1, 6 and 9 of the Debenture which read respectively as follows:

"1. *Payment to the Debenture Holder*

The loan free of interest but together with any other money due and owing or which shall be due or owing from the Company to the Debenture Holder pursuant to this Deed shall be repaid by the Company to the Debenture Holder within nine (9) months from the date of release or disbursement of the loan.

6. *Security Enforceable in Certain Events*

(1) The whole of the loan lent or advanced by the Debenture Holder or any part thereof for the time being outstanding and unpaid together with all other moneys hereby secured shall become immediately payable to the Debenture Holder.

(2) In addition and without prejudice to the provisions aforesaid the moneys mentioned in the preceding Sub-Clause (1) hereof shall also become immediately payable in any of the events following:–

(a) If an order is made or a resolution is passed for the winding up of the Company.